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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re BRIAN W., a Person Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

JAMES W.,

Defendant and Appellant.

D039438

(Super. Ct. No. NJ11828)

APPEAL from a judgment of the Superior Court of San Diego County, Harry M.
Elias, Judge. Affirmed.

James W. appeals a judgment terminating his parental rights to his minor son
Brian W. under Welfare and Institutions Code section 366.26.¹ James challenges the

¹ Statutory references are to the Welfare and Institutions Code.

sufficiency of the evidence to support the court's finding Brian is likely to be adopted if parental rights are terminated. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2000, six-year-old Brian became a dependent of the juvenile court under section 300, subdivision (b) based on findings James willfully or negligently failed to provide him with a suitable home having essentials such as electricity and plumbing. Brian was removed from James's custody and placed with his maternal grandmother, Ester M.²

Brian was thriving emotionally and educationally in Ester's care. James visited Brian regularly but James's behavior during visits was often inappropriate. Brian told the social worker he loved his grandmother and wanted to live with her forever. He said James used to spank him so hard that he thought he would die. Brian also said he preferred not to visit James because he scared him.

By the 12-month review hearing, James had not reunified with Brian. Brian and Ester had a loving and affectionate relationship and Ester wanted to adopt Brian. Brian strongly and consistently expressed his fear of James and his wish to remain with Ester. A psychological evaluation of James by Larry Lyons, Ph.D., showed James had paranoid personality disorder with obsessive-compulsive and anti-social traits. Dr. Lyons described James as volatile, hostile, defensive, angry and belligerent. In Dr. Lyons's

² Brian's mother is deceased.

opinion, James was a potential danger to others and was not psychologically equipped to have custody of Brian. The social worker recommended terminating reunification services and setting the matter for a section 366.26 selection and implementation hearing.

At a contested selection and implementation hearing, the court received into evidence an assessment report recommending termination of parental rights and adoption as the most appropriate plan for Brian. The social worker reported James was confrontational and argumentative during visits with Brian, causing Brian to become upset. James showed no understanding or acceptance of Brian's feelings. He ignored Brian's efforts to get his attention and sometimes refused to play with Brian or respond to his requests. In the social worker's opinion, James and Brian did not have a beneficial parent-child relationship.

Ester continued to meet Brian's physical and emotional needs and he felt secure and happy with her. Brian was fearful of having to return to James's care and repeatedly told the social worker he did not want to live with James or visit him because James lied to him, spanked and pinched him.

The social worker believed Brian was adoptable based on his age, good health, sociable personality and normal development. She described him an active seven-year-old who did extremely well in school. Ester wanted to adopt Brian and an adoptive home study had been initiated. If Ester was not approved for adoption, there were 18 other approved families willing to adopt a child with Brian's characteristics.

Brian testified he liked living with Ester because she helped him when he needed help, fed him when he was hungry and helped him when he was hurt or someone was

mean to him. When he lived with James, there were cockroaches everywhere. James spent all his money on medication that made him sleep. He did not feed Brian much and did not pick him up at school.

Brian testified he would choose to live with Ester. To him, adoption meant someone "comes to take you and then you live with them your whole life until you are a grown-up." Brian said he wanted to be adopted by Ester because she was good at taking care of him. James did not always take care of him and Brian did not want him to be his father any more. He understood the person who adopted him would decide whether he saw James. Brian felt fine about no more visits with James.

Social worker Betty Olson-Greathouse testified consistently with the contents of her assessment report. Specifically, she stated James and Brian had no beneficial parent-child relationship. Brian told her he was agreeable to James not being his father any longer. Olson-Greathouse reiterated Brian was adoptable and there were 18 potential adoptive homes for him. Additionally, the adoptive home study on Ester was nearly completed and the applicant worker saw no reason Ester's home would not be approved.

The court found by clear and convincing evidence it was likely Brian would be adopted if parental rights were terminated. The court also found none of the circumstances of section 366.26, subdivision (c)(1) applied to preclude terminating parental rights.

DISCUSSION

I

James contends the court erred in selecting adoption as Brian's permanent plan without any evidence of Ester's eligibility to adopt. He asserts Brian's strong bond with Ester put him at risk of being unnecessarily removed from her should she not qualify as an adoptive parent.

To the extent James is challenging the sufficiency of the assessment report, he has waived this issue by failing to raise it in the trial court. (*In re Crystal J.* (1993) 12 Cal.App.4th 407, 411; *In re Aaron B.* (1996) 46 Cal.App.4th 843, 846; *In re Urayna L.* (1999) 75 Cal.App.4th 883, 886.)

In his reply brief, James clarifies he is challenging the sufficiency of the evidence in its totality, not just the contents of the assessment report, to support the court's finding of adoptability and termination of parental rights. Under the substantial evidence rule, we have no power to pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or determine where the weight of the evidence lies. Rather, we "accept the evidence most favorable to the order as true and discard the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.) The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order. (*In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

The court can terminate parental rights only if it determines by clear and convincing evidence that it is likely the minor will be adopted. (§ 366.26, subd. (c)(1).)

The statute requires clear and convincing evidence of the likelihood adoption will be realized within a reasonable time. (*In re Amelia S.* (1991) 229 Cal.App.3d 1060, 1065.) In determining adoptability, the focus is on whether a child's age, physical condition and emotional state will create difficulty in locating a family willing to adopt. (§ 366.22, subd. (b)(3); *In re David H.* (1995) 33 Cal.App.4th 368, 379.) A finding a child is likely to be adopted as required by section 366.26, subdivision (c)(1) does not require there be a family identified whose eligibility and commitment have been assessed. Nor must the child be in a potential adoptive home at the time of the selection and implementation hearing. "Usually, the fact that a prospective adoptive parent has expressed interest in adopting a minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent *or by some other family.*" (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650.)

Here, the evidence showed Brian was likely to be adopted based on his age, good health, intelligence, sociable personality and normal development. Where, as here, "evidence of a minor's adoptability is not based solely on the existence of a prospective adoptive parent who is willing to adopt the child, the potential adoptive parent's suitability to adopt is irrelevant to the issue whether the minor is likely to be adopted." (*In re Sarah M., supra*, 22 Cal.App.4th at p. 1651.) Nevertheless, nothing in the record showed Ester was not suitable to adopt Brian. She had cared for Brian for more than 19

months and was committed to adopting him. Brian was thriving in Ester's care. An adoptive home study had been completed and the caseworker saw no reason Ester would not be approved to adopt Brian. In the unlikely event Ester could not adopt Brian, there were 18 other approved adoptive families available for him. Substantial evidence supports the court's finding of adoptability. (See *In re Dakota S.* (2000) 85 Cal.App.4th 494, 506.)

James asserts the exception of section 366.26, subdivision (c)(1)(D) may have applied to preclude terminating his parental rights. That subdivision applies when a child is living with a relative who is unable or unwilling to adopt the child because of exceptional circumstances, not including an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment and the removal of the child from this relative's home would be detrimental to the child. (§ 366.26, subd. (c)(1)(D).) The parent has the burden of showing this exception applies. (See *In re Autumn H.* (1994) 27 Cal.App.4th 567, 574.) Here, James presented no evidence of "exceptional circumstances" to warrant applying section 366.26, subdivision (c)(1)(D).

II

James contends the order selecting adoption and terminating parental rights was based on insufficient evidence of Brian's wishes. Specifically, he asserts the assessment did not include information regarding Brian's opinion of being adopted by someone other than his grandmother.

Preliminarily, we note Brian testified at the selection and implementation hearing. Counsel for James did not question Brian about being adopted by someone other than Ester, nor did counsel argue Brian's opinion should be further explored before the court could select a permanent plan. Thus, James has waived this issue on appeal. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150-1151; *In re Kevin S.* (1996) 41 Cal.App.4th 882, 885-886.)

Even if the issue was not waived, the court had ample evidence of Brian's wishes concerning placement and adoption. (See § 366.21, subd. (i)(5).) Brian repeatedly told his therapist and the social worker he did not want visits with James. He testified he did not like visiting James and he did not want James to be his father any more. Brian said he would choose to live with Ester and he wanted to be adopted. He showed he understood what adoption meant and acknowledged that the person who adopted him would decide whether he saw James. Brian was agreeable to no more visits with James. Once Brian stated his preference to be adopted, the court was not required to further explore his opinion of an alternative placement. (See *In re Leo M.* (1993) 19 Cal.App.4th 1583, 1592-1593.)

III

At the selection and implementation hearing, James's counsel asked the social worker whether she believed "it would be in Brian's best interest to be adopted by a stranger caregiver or be in a less permanent plan with his grandmother should she not clear the adoptive home [study]." The court sustained Agency's objection to the question.

James contends the court erroneously excluded this evidence because it was crucial to the selection of the appropriate permanent plan for Brian.

"The due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court." (*In re Jeanette V.* (1998) 68 Cal.App.4th 811, 817.) The court has wide discretion in admitting or excluding evidence and its ruling will not be reversed except on a showing of a clear abuse of discretion. (*In re Cindy L.* (1997) 17 Cal.4th 15, 35.)

Arguably, the question propounded by James's counsel was relevant generally to which permanent plan was in Brian's best interests, and specifically to whether Brian should remain with his grandmother under a plan of guardianship or long-term foster care if she could not adopt him. However, at the selection and implementation hearing, James argued only the applicability of the beneficial parent-child relationship to preclude terminating his parental rights. He did not argue or present evidence that Ester was unable or unwilling to adopt Brian because of exceptional circumstances so as to trigger the exception of section 366.26, subdivision (c)(1)(D), and he cannot do so for the first time on appeal. (*In re Meranda P., supra*, 56 Cal.App.4th at pp. 1150-1151.) In this context, the court properly sustained Agency's objection to the question by James's counsel.

DISPOSITION

The judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

HALLER, J.

McDONALD, J.